

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

**TO:** Blake Harrison, John Grayson Robinson, and Trey Rogers

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**DATE:** November 16, 2015

**SUBJECT:** Proposed initiative measure 2015-2016 #51, concerning food store licenses.

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

This initiative was submitted with proposed initiative 2015-2016 #52. The comments and questions raised in this memorandum will not include comments and questions that are addressed in the memorandum for proposed initiative 2015-2016 #52, except as necessary to fully understand the issues raised by the proposed initiative. Comments and questions addressed in the other memorandum may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

## Purposes

The major purposes of the proposed amendment to the **Colorado Revised Statutes** appear to be:

1. To create a food store license in the Colorado Liquor Code that would allow food stores to sell only malt and vinous liquors in sealed containers for off-premises consumption;
2. To define a food store as an establishment that offers food items for sale at retail and that generates at least 25% of its annual gross sales income, excluding income from petroleum products and lottery ticket sales, from the sale of food items;
3. To define food items as any raw, cooked, or processed edible substance, ice, and nonalcohol beverage intended for human consumption;
4. To require food store licensees to purchase malt and vinous liquor products only from licensed wholesalers;
5. To prohibit a food store employee who is under 21 years of age from selling malt or vinous liquors;
6. To specify that a person who owns an interest in a retail business licensed under the Colorado Liquor Code is not precluded from conducting, owning, or having an interest in one or more licensed food stores;
7. To permit a business that holds a valid fermented malt beverage retailer's license to apply to the local licensing authority for a food store license if the licensee otherwise complies with the requirements for a food store license and, if the food store license is issued, to permit the business to continue its operations and sell malt and vinous liquors regardless of restrictions in current law pertaining to the location of a retail business selling alcohol beverages in proximity to a school;
8. To specify the criteria the local licensing authority may consider when reviewing a food store license application submitted by a licensed fermented malt beverage retailer;
9. To require the state licensing authority, within 180 days after the measure takes effect, to adopt rules and other findings as necessary to implement and administer food store licenses;
10. To specify that a food store licensee cannot sell spirituous liquors;

11. To establish state and local license fees for food store licenses;
12. To authorize a local licensing authority and the state licensing authority to issue a food store license; and
13. To specify that the measure takes effect July 1, 2017.

## **Substantive Comments and Questions**

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. In section 1 of the measure, new C.R.S. sec. 12-47-425 (1) states that a food store license "shall be issued" to food stores selling beer and wine in sealed containers. While the various license provisions in part 4 of the Colorado Liquor Code are inconsistent in their use of "shall be issued" and "may be issued", in recent years, new license statutes frequently use the phrase "may be issued". The term "shall" suggests that the licensing authorities are required to issue a food store license to allow a food store applicant to sell wine and beer, regardless of whether the applicant meets all the qualifications for licensure.
  - a. Would the proponents consider using the term "may" instead of "shall" to avoid the implication that all food store license applicants will be issued a food store license?
  - b. Alternatively, would the proponents consider adding qualifying language to indicate that the license authorizing a food store to sell beer and wine will be issued if the food store satisfies the requirements in the new section 12-47-425 and rules and requirements of the state and local licensing authorities adopted or imposed in accordance with the section?
3. With regard to subsection (2), would the proponents consider moving the definition of "food store" to the definitions section in the Colorado Liquor Code, sec. 12-47-103, C.R.S.? If you examine the definitions section, you will see that many of the different types of licensed businesses are defined in that general definitions section, which applies to the terms as they are used throughout the entire article (article 47 of title 12, C.R.S., the Colorado Liquor Code), unless otherwise specified. Since the measure refers to "food store" in other sections of the Colorado Liquor Code, it may be more helpful to the public to include the definition of "food store" in the general definitions section

so that it is clear that the definition applies to the term as used throughout the article, not just in sec. 12-47-425, C.R.S. If proponents include the definition of "food store" in the general definitions section, the term should be added in alphabetical order, between subsection (8), defining "fermented malt beverage", and subsection (9), defining "good cause", perhaps as a new subsection (8.5).

4. If proponents move the defined terms to the general definitions section, as mentioned in question 3 above, with regard to the term "food items", that term appears in the definition of "food store" in the measure, but it also appears in current law in sections 12-47-103 (31) and 12-47-407 (1), C.R.S. To avoid the definition of the term "food items", as defined in the measure, applying to that term as it appears in current law, proponents could consider limiting the scope of the definition of "food items". For example, if "food items" is included in the general definitions section, the term could be included within the definition of "food store" as follows: "Food items", as used in this subsection (\_\_\_), means ...". For an example of this format, see sec. 12-47-103 (32), which defines the term "school" and then contains a definition of the term "basic academic education" as that term is used in the definition of "school".
5. Within the definition of "food store", there are several terms that may need clarification. First, what is meant by the term "petroleum products"? Is the intent to exclude revenues derived from the sale of gasoline for automobiles, or does "petroleum products" also include ancillary products, like motor oil? With regard to "lottery ticket sales", does the term include both scratch-off tickets and powerball tickets? Does the term "gross annual income" mean the total amount of revenue generated in sales in a year? Is income referring to all moneys derived from sales or is it limited to profits? Would the proponents consider defining these terms as they are used in the definition of "food store"?
6. With regard to subsection (4) of sec. 12-47-425:
  - a. Does the term "such person" refer to "employee"? Would the proponents consider using consistent terminology? I.e., "No employee shall sell ... unless the employee is ..."
  - b. Also, based on the passage of HB13-1029 and changes to how the term "shall" is used and defined in law, the word "shall" means that a person has a duty. See sec. 2-4-401 (13.7), C.R.S. Accordingly, the phrase "No employee ... shall sell ..." literally means that no employee has a duty to sell. It appears that this subsection is not intended to impose a duty but rather to prohibit employees who are under 21 years of age from selling alcohol. Accordingly, the intent of subsection (4) may be clearer if it is

reworded to state, for example, "An employee of a liquor store licensed under this section shall not sell malt or vinous liquors unless the employee is at least twenty-one years of age."

- c. Subsection (4) appears to place the prohibition against selling alcohol on the employee who is under 21 years of age. Would a food store be subject to discipline under sec. 12-47-601, C.R.S., or guilty of violating the Colorado Liquor Code and subject to penalties under sec. 12-47-903, C.R.S., if the food store allowed an employee who is not 21 years of age to sell alcohol on the premises?

7. With regard to subsection (5) of proposed sec. 12-47-425:

- a. Would the proponents please explain the intent and meaning of this provision? Who is allowed or prohibited from owning multiple licensed businesses?
- b. This provision uses negative words and phrases (e.g., "no owner ... shall be prohibited from ...") but appears to be actually permitting multiple licensed retail business ownership interests. If that is the intent, would the proponents consider rephrasing this provision in the positive to make the meaning clearer? For example, the provision could be restated as "Notwithstanding ... to the contrary, an owner, part owner, shareholder, or other person interested directly or indirectly in one or more retail businesses licensed pursuant to this article may conduct, own in whole or in part, or be interested directly or indirectly in one or more retail businesses licensed pursuant to this section."
- c. Does this provision allow a licensed retail liquor store or liquor-licensed drugstore owner to also own a licensed food store? If so, proponents may need to make conforming amendments to sections 12-47-407 (4) and 12-47-408 (4), C.R.S., to avoid conflicts and confusion.
- d. If the intent of this section is to allow only a licensed food store owner to own more than one licensed food store, the proponents should consider modifying the phrase "retail businesses licensed pursuant to this article" since that term includes retail liquor stores, liquor-licensed drugstores, and possibly businesses licensed to sell alcohol for consumption on the licensed premises.
- e. While the provision appears to allow ownership or interests in multiple licensed retail businesses, including licensed food stores, the provision does not indicate whether a licensed food store owner is permitted or

prohibited from having an interest in any other type of license, such as a manufacturer's or wholesaler's license. Would the proponents consider clarifying in the measure whether licensed retail businesses are permitted or prohibited from owning an interest in other types of licenses?

f. Since a fermented malt beverage retailer is licensed under article 46 of title 12, C.R.S., and not under "this article", which refers to article 47 of title 12, C.R.S., can a licensed fermented malt beverage retail business own or have an interest in a food store license?

8. With regard to subsection (6) of proposed section 12-47-425:

a. If a licensed fermented malt beverage retailer applies for and obtains a food store license, what happens to the fermented malt beverage retailer's license? Does the person retain that license and operate under two licenses? If so, does that conflict with subsection 12-47-425 (4), which appears to only allow multiple ownership interests of retail businesses licensed under "this article", article 47 of title 12, the Colorado Liquor Code, but not retailers licensed under article 46 of title 12, the Colorado Beer Code?

b. This provision only refers to an application to the local licensing authority. Would a licensed fermented malt beverage retailer applying for a food store license under subsection (6) only have to apply to the local licensing authority for a license? Would the fermented malt beverage retailer still need to obtain a state license issued by the state licensing authority? Would the proponents consider clarifying whether the state licensing authority has a role in issuing a food store license to a licensed fermented malt beverage retailer that applies for a food service license under subsection (6)?

c. In the first sentence, what is meant by the phrase "notwithstanding the limitations with respect to location pursuant to the provisions of section 12-47-313 (1) (d) (I)"? Section 12-47-313 (1) (d) (I), C.R.S., appears to prohibit a local licensing authority from accepting or acting on an application for a liquor license under the Colorado Liquor Code or the Colorado Beer Code if the building in which alcohol beverages are to be sold is located within 500 feet of a public or parochial school or the principal campus of a college, university, or seminary. Is the intent of the language in the provision to allow a business that holds a fermented malt beverage retailer's license, regardless of the business' proximity to a school, to obtain and operate under a food store license? Since sec. 12-

47-313 (1) (d) (I), C.R.S., applies to licensed fermented malt beverage retailers, can the proponents explain why this exception is necessary and what the exception is intended to achieve?

- d. In the second sentence, regarding the ability of the local licensing authority to consider a food store license applicant that holds a "valid unexpired fermented malt beverage license" to have satisfied character, reputation, and record requirements, is the intent for this to apply only to a licensed fermented malt beverage *retailer*? If so, would the proponents consider including the word "retailer" between "valid unexpired fermented malt beverage" and "license" to make that clear?
  - e. Is subsection (6) limited to applications submitted by licensed fermented malt beverage retailers? So, in the last sentence of the section, does the phrase "such application" apply to an application submitted by a licensed fermented malt beverage retailer? Does subsection (6) apply to an application for a food store license submitted by a person that is not licensed to sell fermented malt beverages under sec. 12-46-104 (1) (c), C.R.S.?
9. With regard to subsection (7), since the measure has a specific effective date of July 1, 2017, would the proponents consider including the specific date - January 1, 2018 - by which the state licensing authority is to adopt rules?
10. With regard to subsection (8), given that subsection (1) specifies what a licensed food store is authorized to sell, i.e., only malt and vinous liquors, this subsection seems unnecessary.
- a. Would the proponents consider deleting this subsection? Alternatively, would the proponents consider adding this concept to subsection (1), which details what the licensed food store can sell, so that the alcohol beverages that a food store can and cannot sell are included in one provision of the measure?
  - b. Additionally, rather than state that "nothing in this section shall be construed to authorize the sale or possession of spirituous liquors by a person holding a valid food store license", would the proponents consider rephrasing this concept to be a clear, direct prohibition against selling or possessing spirituous liquors? For example, the concept could be stated as "A food store licensed under this section shall not sell or possess spirituous liquors on its licensed premises."

11. The measure does not propose any conforming amendments to section 12-47-901, C.R.S., which lists various unlawful acts and exceptions under the Colorado Liquor Code.

- a. Sec. 12-47-901 (1) (f), C.R.S., states that "it is unlawful for any person: (f) To sell at retail any malt, vinous, or spirituous liquors in sealed containers without holding a retail liquor store or liquor-licensed drugstore license ..." Should this provision be amended to add a food store license as a type of retailer that may sell malt or vinous liquors?
- b. Should sec. 12-47-901 (5) (k) (I), C.R.S., be amended to make it unlawful for a licensed food store to "have on the licensed premises . . . any container that shows evidence of having once been opened or that contains a volume of liquor less than that specified on the label of such container"?
- c. Section 12-47-901 (5) (k), C.R.S., includes an exception to the prohibition against open containers on a licensed retail premises when tastings are authorized on the premises. Do the proponents intend to apply the tastings exception to licensed food stores? If so, proponents should consider amending this section, as well as sec. 12-47-901 (5) (i) (II) and (7) (b), C.R.S., and other provisions of the Colorado Liquor Code pertaining to tastings, to ensure applicability to licensed food stores.
- d. Section 12-47-901 (5) (a) (I), C.R.S., prohibits a person licensed to sell at retail from permitting any alcohol beverage "to be sold or dispensed by a person under eighteen years of age, or to permit any such person to participate in the sale or dispensing thereof." The last sentence of that subparagraph then states: "No employee of ... a retail liquor store shall sell malt, vinous, or spirituous liquors unless such person is at least twenty-one years of age." Given that in section 1 of the measure, sec. 12-47-425 (4) appears to prohibit alcohol sales in food stores by employees who are under 21 years of age, would the proponents consider making a conforming amendment to sec. 12-47-901 (5) (a) (I), C.R.S., to avoid confusion and conflict between that section and sec. 12-47-425 (4), as proposed in the measure, and to make it clear who can and who cannot sell beer and wine at a licensed food store?
- e. Sec. 12-47-901 (8), C.R.S., prohibits, among other things, a licensed fermented malt beverage retailer from "hold[ing] or operat[ing] under any other license for the sale of any beverages containing alcohol in

excess of three and two-tenths percent by weight or four percent by volume for the same premises." This provision may conflict with sec. 12-47-425 (5) and (6) of section 1 of the measure. Would proponents consider making any necessary conforming amendments to sec. 12-47-901 (8), C.R.S. to avoid conflicts with proposed sec. 12-47-425?

12. While section 6 of the measure specifies that the measure takes effect on July 1, 2017, section 12-47-425 (7) in section 1 of the measure builds in a 6-month delay to allow the state licensing authority to adopt rules necessary to implement the new food store license. Presumably, applications for a food store license cannot be accepted until the state licensing authority has adopted necessary rules, but since the measure states that it takes effect on July 1, 2017, it's not clear whether the state licensing authority would have to accept applications as of July 1, 2017. It may be helpful, therefore, to include what is referred to as an "applicability clause", by which a different date can be specified in the measure for when the measure applies to applications for food store licenses. An example of a combined effective date and applicability clause is provided below:

**SECTION 6. Effective date - applicability.** This act takes effect July 1, 2017, and applies to food store license applications submitted on or after (*insert date at least 6 months after July 1, 2017*).

## Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. To conform with standard statutory practice, in the headnote for Section 1, "Food Store License," do not use small capital letters, capitalize only the first letter of the first word, and include rules and definitions, as follows:

**12-47-425. Food store license – rules – definitions.**

2. At the end of subsection (1) of Section 1, we recommend the following words (denoted in italics) be added for clarity:

(1) NOTWITHSTANDING ANY PROVISIONS TO THE CONTRARY IN THIS ARTICLE, A FOOD STORE LICENSE SHALL BE ISSUED TO FOOD STORES

SELLING ONLY MALT AND VINOUS LIQUORS IN SEALED CONTAINERS NOT TO BE CONSUMED AT THE PLACE WHERE *THE MALT AND VINOUS LIQUORS ARE SOLD*.

3. Definitions in the Colorado Revised Statutes are formatted in a standardized way. The terms that are defined are set off in quotation marks, i.e., "food store" and "food items", and when multiple terms are defined, they are usually set off in different paragraphs or subparagraphs, as in a list. To follow this standard format, we recommend the following, including listing the defined terms in alphabetical order and offsetting them with quotation marks:

(2) AS USED IN THIS SECTION:

(a) "FOOD ITEMS" MEANS ANY RAW, COOKED, OR PROCESSED EDIBLE SUBSTANCE, ICE AND BEVERAGE, OTHER THAN ANY BEVERAGE CONTAINING ALCOHOL, INTENDED FOR USE OR FOR SALE IN WHOLE OR IN PART FOR HUMAN CONSUMPTION.

(b) "FOOD STORE" MEANS AN ESTABLISHMENT, OTHER THAN A RESTAURANT AS DEFINED AT SECTION 12-47-103 (30), THAT OFFERS FOR SALE FOOD ITEMS AT A RETAIL PREMISES, PROVIDED THAT A MINIMUM OF 25% OF THE GROSS ANNUAL INCOME FROM ITS TOTAL SALES, EXCLUDING PETROLEUM PRODUCTS AND LOTTERY TICKETS SALES FROM SUCH TOTAL, IS DERIVED FROM THE SALE OF FOOD ITEMS.

4. In subsection (4) of Section 1, it would be clearer to use the phrase "food store licensed under this section" rather than "licensee under this section".
5. In subsection (5) of Section 1, there should be no comma before "shall."
6. When referencing other sections internally, the words "the provisions of" are unnecessary. For example, write "under section 12-46-104 (1) (c)" or "pursuant to section 12-46-104 (1) (c)," and not "under *the provisions of* section 12-46-104 (1) (c)."
7. In subsection (6) of Section 1, specify the effective date as July 1, 2017, rather than writing out "the effective date of this section."
8. In the second sentence of subsection (6) of Section 1, add a comma after "if" to set off the clause "at the time of the filing of the application."
9. In the last sentence of subsection (6) of Section 1, the phrase "but shall not be required to" is not necessary. The preceding word, "may," already makes clear

that the licensing authority is not required to make the considerations mentioned. The word “shall” implies a duty or requirement.

10. In subsection (7) of Section 1, the two instances of the word “such” are not necessary.
11. In subsection (7), reference to the "state liquor licensing authority" should be changed to "state licensing authority" since that is the defined term used throughout the Colorado Liquor Code.
12. Generally, when a bill amends several sections of law, the sections are included in the bill in numerical order. While it is appropriate that the main statutory provision, e.g., the section creating the new food store license, appear as section 1 of the measure, the succeeding C.R.S. sections that are being amended should appear in numerical order. Accordingly, sections 2 through 5 should be reordered as follows:
  - a. Section 4, amending sec. 12-47-309, should be moved to section 2;
  - b. Section 5, amending sec. 12-47-401, should be moved to section 3;
  - c. Section 2, amending sec. 12-47-501, should be moved to section 4; and
  - d. Section 3, amending sec. 12-47-505, should be moved to section 5.
13. In sections 2 through 5 of the measure, the amending clauses should read as follows, respectively:
  - a. **SECTION 2.** In Colorado Revised Statutes, 12-47-501, **add** (1) (f.5) as follows:
  - b. **SECTION 3.** In Colorado Revised Statutes, 12-47-505, **add** (1) (b.5) as follows: Note that there is no need to specify the addition of subparagraphs (I) and (II) since those are both within the new paragraph (b.5)
  - c. **SECTION 4.** In Colorado Revised Statutes, 12-47-309, **add** (1) (n) as follows:
  - d. **SECTION 5.** In Colorado Revised Statutes, 12-47-401, **add** (1) (w) as follows:
14. In section 3, at the beginning of subparagraph (II), the inclusion of "(b.5)" is unnecessary since it appears before subparagraph (I).

15. In order to conform to standard statutory language, Section 6 should be written as follows:

**SECTION 6. Effective date.** This act takes effect July 1, 2017.